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No. 89-44

In The

Supreme Court of the United States

October Term, 1989

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

Respondent.

FRANCIE BURNHAM,

Real Party in Interest.

On Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

I. WIFE'S BRIEF ON THE MERITS IMPLICITLY CONCEDES THAT JURISDICTION OVER HUSBAND CANNOT BE BASED SOLELY ON THE FACT THAT HE WAS PERSONALLY SERVED IN CALIFORNIA.

A. Wife's Brief Reflects A Fundamental Misunderstanding Of The Doctrine Of Transient Jurisdiction.

Wife does not seriously attempt to defend the traditional doctrine of transient jurisdiction, on which she relied below. Instead, she takes the same position that she did in her Answer to the Petition for Writ of Certiorari – that the present case does not actually involve the

transient jurisdiction rule because she is a California resident, and Husband's presence in California when he was served was not "transitory, fleeting, momentary, casual or fortuitous". Wife's Brief on the Merits (hereafter "WB") 10, 19-20. This reveals a fundamental misunderstanding of what is at issue in this case.

There are only two existing methods of jurisdictional analysis. If the defendant is served in the state, no further inquiry needs to be made. If the defendant is not served in the state, before he can be required to defend the litigation there, an inquiry must be made regarding whether his contacts with the state are sufficient to satisfy traditional notions of fair play and substantial justice.

It is the first approach which is at issue here. Although the doctrine has been called "transient" or "gotcha" jurisdiction by commentators and in the decisions, it is not limited to such extreme situations. Rather, its theoretical foundation is based squarely on the belief that a state has jurisdiction over every individual who is served within its borders, regardless of any other considerations. This exercise of jurisdiction depends solely on the *fact of service in the state.*[1]

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[1] Wife suggests that three decisions by this Court explicitly upheld the exercise of personal jurisdiction over a non-resident defendant, based solely on service in the state. This is incorrect.

The constitutional question in *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (WB 14) was whether a court of one state was required to give full faith and credit to a judgment obtained in another state, where the judgment was based on an illegal contract.

New York v. O'Neill, 359 U.S. 1 (1959) (WB 16, 24) upheld a statute which permitted a citizen of Illinois, who was in Florida to attend a convention, to be taken into custody and transported to New York to testify as a witness before the grand jury.

Perkins v. Benguet Mining Co., 342 U.S. 437 (1952) (WB 16-17, 24) upheld personal jurisdiction over a non-resident corporation on a cause of action unrelated to its activities in the state because its general business there was continuous and systematic.

It is no defense of transient jurisdiction to say that because it has been a traditional basis for jurisdiction, it is therefore consistent with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny. WB 23-24. Under *International Shoe*, jurisdiction must satisfy traditional notions of *fair play and substantial justice*. 326 U.S., at 316. Transient jurisdiction may be traditional, but it is not fair play and does not accomplish what has come to be regarded as substantial justice. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186 (1977) where the Court rejected the traditional doctrine of *quasi in rem* jurisdiction, stating that traditional notions of fair play and substantial justice can be offended by "ancient forms that are no longer justified." At p. 212.

B. The Procedural History Of This Case Establishes That The Only Reason The California Courts Upheld The Exercise Of Personal Jurisdiction Over Husband Was The Mere Fact That He Was Served While Present In The State.

Husband's motion to quash service for lack of personal jurisdiction argued that under *Shaffer v. Heitner, supra*, 433 U.S. 186 and *Kulko v. California Superior Court*, 436 U.S. 84 (1978) California could not exercise personal jurisdiction over him, unless he had the requisite minimum contacts with the state, which he did not. JA 11-14, Doc. #5, pp. 2-6.

If it were not for the fact that Husband was personally served while he was physically present in California, this case would have been governed by numerous California decisions which required that Husband's motion be granted. See e.g. *Kumar v. Superior Court*, 32 Cal.3d 689, 703-704, 652 P.2d 1003, 186 Cal.Rptr. 772 (Cal. 1982); *Titus v. Superior Court*, 23 Cal.App.3d 792, 799-805, 100 Cal.Rptr. 477 (Cal. Ct. App. 1972); *Judd v. Superior Court*, 60 Cal.App.3d 38, 41-46, 131 Cal.Rptr. 246 (Cal. Ct. App. 1976); *In re Marriage of Malak*, 182 Cal.App.3d 1018, 1023-1024, 227 Cal.Rptr. 841 (Cal. Ct. App. 1986); *Modlin*

v. Superior Court, 176 Cal.App.3d 1176, 1179-1182, 222 Cal.Rptr. 662 (Cal. Ct. App. 1986).[2]

Wife's opposition relied on now superseded section 28 of the Restatement, Second, Conflict of Laws, for the principle that a state has power to exercise jurisdiction over a defendant who is present within its territory, whether permanently or temporarily. She argued: "The first and most important basis for jurisdiction over the person of an individual is presence within the boundaries of the state. This is true of any person voluntarily within the state, whether he is a permanent resident or a temporary visitor; his presence gives the state power over him." Doc. #8, pp. 1-2.

Wife also submitted an affidavit she had filed in Husband's New Jersey divorce action, which contained allegations about his business contacts with California and visits there to spend time with his children. Doc. #6. If the trial court had believed that those contacts satisfied the minimum contacts test, it would have denied Husband's motion to quash. Instead, the trial court initially ruled that California did not have personal jurisdiction over Husband, and could only adjudicate the issue of marital status. JA 21-22.

Wife then filed a motion for reconsideration. Doc. #12. She argued that California had personal jurisdiction over Husband, based solely on the fact that he was served while he was present in California. Doc. #12, pp. 4-6. She stated:

> While counsel for [Husband], or anyone else may speculate regarding what the U.S. Supreme Court *might* do when the question is properly presented to it, the fact is that the Supreme Court has never abrogated the principle set forth in Restatement section 28. Nor has an appellate court in California ever done so with respect to the California counterpart.
>
> Doc. #12, p. 6:6-11, emphasis in original.

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[2] These decisions are discussed in Husband's Brief on the Merits, and have been ignored by Wife.

Wife's argument continued:

> . . . because [Husband] is subject to in personam jurisdiction of the California courts on the basis on his presence in the state at the time of service of process, it is not necessary to even consider the question of "minimum contacts" under *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 and its progeny.[3]
>
> Doc. #12, p. 6:23-28.

At the hearing on Wife's motion to reconsider, Husband argued that every exercise of personal jurisdiction must meet the minimum contacts test. Doc. #17, p. 6:8-20. The trial court instead focused on the issue of personal service on Husband while he was present in the state and asked, "Do you have any cases in which the husband or the defendant was served in the State of California?" *Id.*, at p. 6:21-23. Neither counsel was aware of any such decision. *Id.*, at p. 6:24-28. The trial court took the matter under submission. *Id.*, at p. 13:17. It then accepted Wife's position and granted her motion to reconsider, ruling that California had personal jurisdiction over husband after all. JA 26.

In Husband's Petition for Writ of Mandate in the California Court of Appeal, he continued to argue that after *Shaffer*, service on a non-resident defendant in the state is insufficient to permit the exercise of personal jurisdiction. Wife's response argued that "husband's *presence within California while he was served* with the petition and summons is, *in and of itself*, a sufficient basis for the exercise of jurisdiction by the California courts." Wife's Return to Petition for Writ of Mandate at 7:2-5, emphasis added.

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[3] As a fallback position, Wife argued that the facts set forth in the affidavit she had previously filed satisfied the minimum contacts test. Doc. #12, pp. 6:28-7:9.

Since Wife had taken the fallback position that Husband had the requisite minimum contacts with California, Husband also explained why the trial court's ruling could not be sustained on that basis. Wife therefore also claimed that her affidavit supported jurisdiction under the minimum contacts test. Wife's Return at 7:6-9.

Just as the trial court had recognized that jurisdiction over Husband could not be upheld under a minimum contacts analysis, the Court of Appeal also declined to accept Wife's alternative argument that California could exercise personal jurisdiction on that basis. Instead, its holding was squarely grounded on Wife's argument that personal service on a non-resident while he was in the state, in and of itself, is a sufficient basis for personal jurisdiction. It stated: "that personal presence continues to be a valid jurisdictional predicate for in personam jurisdiction and that *Shaffer v. Heitner* (1977) 433 U.S. 186 does not compel a contrary conclusion. As the trial court noted, no California or United States Supreme Court case has applied *Shaffer*'s 'minimum contacts' analysis to a defendant present in the forum state and personally served with process." JA 34.

Husband then filed a Petition for Review in the California Supreme Court. Wife's Answer recognized that the only reason the California courts had upheld the exercise of personal jurisdiction over Husband was that he was served while present in California. She stated as follows: "Both the Superior Court and the Court of Appeal have determined that California can exercise personal jurisdiction over husband *because he was personally served with process while he was present in the state of California.*" Wife's Answer to Petition for Review at 5:23-26, emphasis added.

The foregoing chronology establishes that the California courts upheld the exercise of personal jurisdiction solely on the basis that Husband was served while he was present in the state, and rejected asserting personal jurisdiction on the basis that he had minimum contacts with

the state. Thus, if this Court now decides that service while present in the state is not sufficient, it should simply order that Husband's motion to quash be granted.

II. WIFE MISUNDERSTANDS HUSBAND'S ARGUMENT REGARDING THE SIGNIFICANCE OF THE FACT THAT HE WAS SERVED WHILE HE WAS IN CALIFORNIA TO SPEND TIME WITH THEIR CHILDREN.

Husband has consistently argued that exercising personal jurisdiction over a parent who is in a state for the purpose of spending time with his children should never be allowed because this would have a detrimental effect on the parent/child relationship. HB 34-44. The California courts have recognized the importance of this principle, and have applied it in considering whether to exercise personal jurisdiction over a non-resident parent based on a minimum contacts analysis. See decisions cited above on page 3.

The strong public policy of encouraging visitation was not given effect here, solely because the state courts were unwilling to abandon the transient jurisdiction rule. Accordingly, if this Court were to decide that personal service while the non-resident defendant is present in the state is no longer sufficient, and that all assertions of state court jurisdiction must be based on a minimum contacts analysis, it would not have to consider the extent to which the jurisdictional inquiry in a family law action should be affected by the countervailing considerations involving children.

On the other hand, this Court might decide to adopt a variant of the traditional rule. The due process question then would become how to decide what, if any, significance should be given to the fact that a non-resident parent was served while he was in a state to see his children. This was the context in which Husband argued that as a matter of constitutional doctrine, service on a non-resident parent should never be given any weight in

the jurisdictional equation. Wife's Brief is not responsive to Husband's central arguments on this point.

First, Wife argues that the regulation and control of marital and family matters is a state concern, and not a function for this Court. WB 47. Wife misses the point. This Court has held that whether a state can constitutionally exercise personal jurisdiction over a non-resident defendant depends, in part, on the extent to which doing so would further or frustrate the shared interests of the states in furthering fundamental substantive social policies. HB 34-35. Wife recognizes this principle. WB 31.

Where Wife goes wrong is to argue that Husband is suggesting that this Court establish a "national code of domestic relations". WB 48. Not so. He is only suggesting that this Court give significant weight in its jurisdictional analysis to the universal policy of encouraging visitation, which already exists. This well established public policy is precisely one of those shared state interests which is relevant in determining how the constitutional inquiry into personal jurisdiction should be resolved. Since Wife does not dispute that there is such a shared substantive policy, Husband's argument on this point stands essentially unrefuted.

Second, Husband argued that whether a state can constitutionally exercise personal jurisdiction over a non-resident defendant depends in part on the degree to which doing so would adversely impact the defendant's other constitutional rights. HB 35. Wife does not dispute that this is a correct theoretical approach. Instead, she attempts to distinguish the decisions on which Husband relied to establish that such other constitutional rights are implicated here. Wife points out that these decisions all involved situations where a parent's rights were going to be terminated. WB 48.

Again, Wife misses the point. The rationale underlying the decisions on which Husband relies is that this

Court has long recognized that fundamental constitutional rights are involved in the parent/child relationship. The fact that asserting personal jurisdiction over Husband would not terminate these rights, but simply have a chilling effect on exercising them, is a distinction without a difference.

Husband's Brief explained why it is inevitable that exercising personal jurisdiction over a parent who is served while he is in a state to spend time with his children will tend to discourage visitation. HB 40-44. Wife asserts that because the Court of Appeal stated that California's exercise of personal jurisdiction will not interfere with the policy of encouraging visitation, this is an issue of state law which should not be reviewed here. WB 48-49. Wife is incorrect.

The part of the Court of Appeal opinion on which Wife relies is not a factual finding, but a legal conclusion based on certain facts. The question of whether personal jurisdiction is constitutional on a given set of facts is always fundamentally a federal question which raises the interplay between constitutional rights and jurisdictional theory. Therefore, it should not be left to state courts to determine on a case-by-case basis, without principled guidance from this Court.

Third, Wife argues that "the Court must focus not only on Husband's parental and other rights but also on the important rights of the Wife and children." WB 49. Yet Wife acknowledges that the jurisdictional inquiry focuses primarily on the non-resident defendant's due process rights. WB 37.

If the children need additional support, it can easily be obtained through an action in New Jersey under the Revised Uniform Reciprocal Enforcement of Support Act. *Kulko v. California Superior Court*, *supra*, 436 U.S. at 98-99. As the Court stated in *Kulko*: "It cannot be disputed that California has substantial interests in protecting resident children and in facilitating child-support actions on behalf of those children. But these interests simply do not

make California a 'fair forum', *Shaffer v. Heitner, supra,* 433 U.S. at 215, in which to require [husband], who derives no personal commercial benefit from his child's presence in California and who lacks other relevant contacts with the state, either to defend a child-support suit or to suffer liability by default." At 100-101.

Whether the inconvenience to Wife from having to litigate the validity of the marital settlement agreement in New Jersey can outweigh Husband's due process rights, is discussed below in section III.B.

III. NONE OF WIFE'S OTHER ARGUMENTS IN SUPPORT OF CALIFORNIA'S EXERCISING PERSONAL JURISDICTION HAS ANY MERIT.

A. The Court Should Not Adopt The Reformulation Of Transient Jurisdiction Proposed In The Restatement.

Wife's present position is essentially to urge the Court to approve the reformulation of transient jurisdiction recently adopted in the Restatement, Second, Conflict of Laws section 28. WB 12, 21-23. Under it, jurisdiction can be exercised whenever a non-resident defendant is served in the state, unless this would be unreasonable.

Husband's Brief on the Merits explained why jurisdiction would not be proper here under the examples given in the Restatement for applying its approach. HB 48-49. Before responding to Wife's application of that rule here, Husband will explain why, in the first instance, the Court should not adopt the Restatement's new position.

First, it makes no sense to have a less stringent test for exercising jurisdiction over a non-resident defendant who is served while physically present in the state, and a more stringent test for a non-resident defendant who is served outside of the state. Having two different tests simply reflects an unwillingness to reject definitively the discredited myth that a state's jurisdiction is based on its

physical power over the defendant. It is a vestige of the outmoded approach to jurisdiction which this Court rejected in *International Shoe* and *Shaffer*. A full and final break should be made now. The Court should give effect to its statement in *Shaffer* that "all assertions of state court jurisdiction" should be judged by the minimum contacts test. 433 U.S., at p. 212.

Second, the Restatement's formulation establishes a presumption in favor of exercising jurisdiction over a non-resident defendant who is served in the state. It shifts the burden from the plaintiff, who usually must establish a basis for jurisdiction, to the defendant, who must now defeat it. This provides an incentive for plaintiffs to lure non-residents to a state, in order to serve them and thereby obtain an advantage from the presumption.

Third, the large body of law which has evolved around the "minimum contacts" test, which focuses on the nexus among the defendant, the forum, and the nature of the litigation, gives guidance to courts ruling on challenges to jurisdiction. As the Court intimated in *Shaffer*, this well developed body of law should be made applicable to all assertions of state court jurisdiction. Allowing a state court to exercise jurisdiction unless the non-resident can convince it that doing so is "unreasonable", under a less stringent standard than provided by the minimum contacts test, introduces a subjective element into the jurisdictional inquiry which is too elusive. The due process rights of non-resident defendants should not rest on such a slender reed.

B. None Of Wife's Arguments Establishes That It Is Reasonable For California To Exercise Personal Jurisdiction Over Husband.

Introduction

It is apparent that Husband's contacts with California are insufficient to justify its exercise of personal jurisdiction under a traditional minimum contacts analysis. His few business contacts have nothing to do with Wife's lawsuit. This Court held that jurisdiction was impermissible in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984) where the defendant had substantially more contacts than Husband did here because those contacts were unrelated to the plaintiff's cause of action.

The fact that Husband allowed his children to move to California is also not the kind of act which gives rise to personal jurisdiction, even for a motion to increase child support. *Kulko v. California Superior Court, supra*, 436 U.S. 84. Accordingly, it certainly cannot be sufficient to support personal jurisdiction in Wife's action to set aside a marital settlement agreement.

Faced with these insurmountable problems, Wife does not attempt to fit this case into a traditional minimum contacts analysis. Instead, she offers a potpourri of reasons that purportedly make it "fair and reasonable" for California to exercise jurisdiction. WB 28-47. None of them has any merit, for the following reasons.

1. Running throughout Wife's Brief is the argument that it is not unreasonable to require Husband to litigate in California because judicial proceedings had not been initiated in New Jersey, before Wife and the children moved to California. See, e.g., WB 10-11, 32, 43.

Wife ignores the importance of the fact that the parties had entered into a complete written marital settlement agreement in New Jersey before she left. That agreement resolved every issue involved in the termination of their marriage. Moreover, the agreement provided

that it would be interpreted in accordance with New Jersey law and that any visitation disputes would be submitted to the New Jersey courts. See HB 2-3. Wife concedes that she expected Husband to file a divorce action in New Jersey (WB 3-5), and the agreement provided that it would be incorporated into whatever action was filed.

Therefore, this is far from a situation where Husband reasonably could have expected to be haled into a California court to litigate all of the issues arising from the termination of their marriage. On the contrary, he had every right, and every reason, to expect that this would not occur. Compare *Hanson v. Denckla*, 357 U.S. 235, 252 (1958), where the Court found no jurisdiction, noting that the lawsuit "involves the validity of an agreement that was entered into without any connection with the forum state." See also 357 U.S. at 254.

2. Wife asserts that Husband reasonably should have expected to be haled into a California court because he agreed to file for a divorce in New Jersey on the ground of "irreconcilable differences", and instead he filed on the ground of "sexual desertion". WB 4-5, 32.

This new argument reveals the true motivation of Wife's attempt to use a California court to upset the marital settlement agreement. It appears that Wife would not have attacked the agreement, nor filed this action, if only Husband had sought a divorce in New Jersey based on irreconcilable differences. Wife's wounded feelings, resulting from Husband's seeking a divorce based on

sexual desertion, are not a valid reason to force Husband to defend this action in California.[4]

Moreover, this Court has held that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the due process clause." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). For instance, the Court pointed out that it was foreseeable in *Kulko* that the mother, who had moved to California, would ask for an increase in child support when the children came to live with her, yet California did not have jurisdiction because the father did not have sufficient contacts with California. 444 U.S., at 296.

3. Wife claims Husband had "fair warning" that he would be served when he visited the children because his business partner told him Wife had initiated a legal action in California. WB 11, 20, 44. This is a non-sequitur. The jurisdictional issue is whether, at the time of the transaction giving rise to the plaintiff's cause of action, the nonresident defendant reasonably could have anticipated being haled into a foreign state to litigate a dispute arising out of that transaction.

Wife's position actually supports Husband's argument that personal jurisdiction should never be based on service when a parent comes to a state to see his children.

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[4] Some of Wife's factual assertions on this issue are not supported by any record references and should be disregarded. See WB 4-5. The reason Husband did not seek a divorce in New Jersey based on irreconcilable differences is that ground requires an eighteen month wait. Doc. #6, p. 7, ¶15. Nor was Husband's assertion of sexual desertion false. Wife acknowledged that they ceased having sexual relations long ago. Doc. #6, p. 2, ¶3.

Moreover, Husband had no objection to Wife obtaining a marital dissolution in California based on irreconcilable differences, as long as it incorporated their marital settlement agreement. The parties could obtain a divorce in New Jersey based on irreconcilable differences now because eighteen months have elapsed since they separated.

Her position essentially reduces to imposing on Husband the Hobson's choice of having to defend against her California action because he was warned about it, or not spending time with his children. This is not a policy which should be fostered.

4. Wife argues that California has an interest in adjudicating this dispute which should permit it to exercise personal jurisdiction over Husband. WB 34-36.

The Court rejected such an argument in *Kulko*, and rightly so. 436 U.S., at 93-101. Adopting this reasoning would permit a custodial parent to obtain personal jurisdiction over a former spouse, in any state where she eventually decides to live with the children. Not only would this be extremely unfair, but it would discourage the harmonious resolution of family disputes by creating conflicts over whether one parent should allow the other to move to another state with the children.

Wife attempts to distinguish *Kulko* on the ground that it involved a post-judgment motion for modification. WB 40-44. This is a distinction without a difference. The parties here had settled their marital disputes before Wife left New Jersey and moved to California.

Wife relies on *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 783 (1984) to argue that her current California residence is an important factor in the jurisdictional inquiry. WB 34-35. Neither decision supports her position. Those were both tort actions in which jurisdiction was upheld because the nonresident defendants' activities were directed at, and caused harm in, the state. Sending children to a state is not within that rule. *Kulko*, at pp. 96-97.

5. Wife argues that this Court should reverse many older decisions and hold that whenever a state has jurisdiction to dissolve a marriage and to adjudicate custody issues, it should also be able to litigate all issues relating to the family. WB 45-47. Wife gives no valid reason to support such a radical change in the law.

The reason a state can adjudicate issues relating to marital status and custody is that they involve "status" and cannot result in a judgment which requires the nonresident defendant to pay money to the plaintiff. *Kumar v. Superior Court, supra,* 32 Cal.3d, at 695-704.[5]

6. Wife relies on the fact that Husband made a yearly trip to California during each of the ten years before the parties separated. WB 11, 28.

These visits had nothing to do with any of the issues in Wife's family law action. Periodic travel to a state does not establish a sufficient connection between the nonresident defendant and the state to make it reasonable to require him to litigate a marital dispute there. See, by analogy, *Rosenberg Bros. & Co. v. Curtis Brown Co.,* 260 U.S. 516 (1923), cited with approval in *Helicopteros, supra,* 466 U.S. at 417-418, which held that purchases in a state at regular intervals, even coupled with visits to the state, are not a basis for jurisdiction unrelated to those transactions.

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[5] Moreover, in light of the Court's decision in *May v. Anderson,* 345 U.S. 528 (1953) there is a serious question as to whether the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act are unconstitutional insofar as they allow a state to adjudicate child custody without personal jurisdiction over both spouses. See Sherman, *Child Custody Jurisdiction and the Parental Kidnapping Prevention Act – A Due Process Dilemma,* 17 Tulsa L.J. 713 (1982). This is a thicket which the Court need not enter in the present case.

Wife also notes that during the months before Husband was served, and since then, his trips became more frequent. WB 28. The record establishes that the reason for this is to spend more time with his children.[6]

7. Wife argues that personal jurisdiction over Husband is proper because he availed himself of public and private facilities in California, and derived tax and other benefits from his activities in California. WB 29.

Whatever benefits Husband obtained from his business activity were unrelated to Wife's action. The fact that a parent allows his children to live in a state is a benefit to the children, not to the parent. *Kulko, supra,* 436 U.S., at 94-96. Whatever tax benefits Husband obtained from combining his visits to see his children with business in California derived from federal law, not state law. Accordingly, it is not a benefit that can justify California's exercise of jurisdiction.

8. Wife relies on the New Jersey courts wanting California to exercise personal jurisdiction over Husband in her action. WB 6-8, 35-36.

Nothing in the New Jersey trial court order that was before the California trial court supports this conclusion. Its comments regarding jurisdiction were limited to which state would be better able to implement the policies of the Uniform Child Custody Jurisdiction Act. See HB 48.

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[6] Wife asserts that Husband "undoubtedly will continue" to make business trips to California. WB 37-38. Wife knows this is false. She is aware that Husband's partners bought out his interest in the business during the summer of 1989. With Wife's consent, funds from this sale are being held in escrow pending the outcome of this litigation. Thus, Husband no longer has any reason to come to California except to see his children.

Contrary to the implication which wife attempts to create (WB 6-8, 35-36), the issue of whether Wife executed the marital settlement agreement as a result of fraud or undue influence has not actually been litigated on the merits in New Jersey. It is circular reasoning to assume that the agreement is invalid and use that as a basis for establishing jurisdiction in California.

Moreover, Husband is not attempting to obtain jurisdiction over Wife in New Jersey on the ground that the agreement was executed there. WB 36, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). New Jersey has jurisdiction because Husband has always resided there and Wife had substantial marital contacts there before she left.

It is ironic that Wife continues to want to litigate the validity of the agreement in California. If her characterization of the attitude of the New Jersey courts is correct, it appears that she might prevail there on the merits.[7]

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[7] Husband objects to Wife having appended the New Jersey Court of Appeal decision to her Brief. It is not part of the record in the California action. The circumstances under which the New Jersey action was tried, briefed, and decided on appeal, are outside this record and beyond the scope of this Court's consideration.

For instance, the opinion erroneously states that Husband "manipulated [Wife] into moving to California so that he could bring his divorce action in New Jersey . . . " WB, App. 2. Wife's own declaration, filed in the California action, demonstrates that it was she who wanted to move to California. JA 17. She never asserted that Husband manipulated her into moving to California. See WB 3-4 [Husband threatened to restrain Wife from moving to California].

9. Wife contends that it will be no actual burden on Husband, if he is required to litigate her action in California because he litigated the jurisdictional dispute and he will continue to come to California to spend time with their children. WB 37-38.

The fact that Husband retained counsel to object to jurisdiction cannot support the conclusion that it would not impose a burden on him to litigate the merits. If such an argument were accepted, no one could ever successfully object to jurisdiction. Husband's visits with his children should be for the purpose of developing his relationship with them as they grow. They should not be marred by his attendance at depositions and court hearings, which could be numerous and extensive. See HB 40-42.

Even if Husband has a higher degree of mobility than Wife (WB 39), this is not a valid reason for permitting California to exercise personal jurisdiction. The restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states." *Hanson v. Denckla, supra*, 357 U.S., at 251. See also *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S., at 292 where the Court reiterated that the minimum contacts test not only protects the defendant against the burdens of litigating in a distant or inconvenient forum but it also "acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system."

Moreover, Wife created this situation by leaving New Jersey. Giving significant weight to her current inconvenience in the jurisdictional calculus would allow the custodial parent to establish the basis for personal jurisdiction, anywhere she decides to move with the children.

10. Finally, Wife asks the following rhetorical question: "Under the facts and circumstances of this case, why should one separated spouse who chose to stay and begin a new life in familiar surroundings be rewarded while the other spouse chose to travel to another state and begin a new life in a new place be penalized?" WB 46.

This question has a simple answer, which Wife simply refuses to acknowledge. This is not a matter of penalizing or rewarding anyone. It is a matter of protecting Husband's due process rights and drawing constitutional limits on the ability of one state to adjudicate the rights of a citizen of another state.

Wife can still litigate the validity of the marital settlement agreement in New Jersey, as she could have done before she left there and moved to California. It would be unfair and unreasonable to require Husband to do so in California.

CONCLUSION

For all of the foregoing reasons, and based on the foregoing authorities, it is respectfully submitted that this Court instruct the California Court of Appeal to issue a writ of mandate, compelling the California Superior Court to grant Husband's motion to quash for lack of personal jurisdiction, or that this Court itself direct the Superior Court to do so.

Respectfully Submitted,

DE GOFF AND SHERMAN

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and VICTORIA J. DE GOFF